Standard Chartered Bank Malaysia Bhd v Eng Song Huat

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO D5-22-430-94
KAMALANATHAN RATNAM JC
4 NOVEMBER 1995

Civil Procedure *— Summary judgment — Delay — Plaintiff made application two months after delivery of defence — Explanation for delay given orally not by affidavit — Whether there was inordinate delay in filing application — Whether there was sufficient explanation for delay — Whether summary judgment should be set aside — Rules of the High Court 1980 O 14*

Civil Procedure *— Summary judgment — Triable issues — Defendant guarantor alleged that notice of demand not served on him — Plaintiff referred court to writ, notice and solicitors' postage record to prove that writ and notice had been sent to defendant — Address of defendant not stated in loan agreement and guarantee — No evidence that address stated on demand was proper address — Whether defendant had raised a triable issue — Whether a proper case for summary judgment — Rules of the High Court 1980 O 14*

The plaintiffs granted a loan to a company for a sum of RM1m pursuant to a loan agreement. The defendant was the guarantor. In addition to creating a debenture, the defendant had also charged a piece of his land ('the land') to the plaintiffs. The borrower later failed to repay the loan and the plaintiffs sold the land. The plaintiffs had also started an action by writ against the defendant to recover the balance sum of the loan and the accrued interest on 30 April 1994. The defendant entered appearance on 28 May 1994, and filed his defence on 8 July 1994. On 21 July 1994, the plaintiffs made an application to change their name from Standard Chartered Bank to Standard Chartered Bank Malaysia Bhd, pursuant to O 15 r 7 of the Rules of the High Court 1980 ('the RHC'). The application was granted on 5 September 1994. The plaintiffs filed for summary judgment under O 14 of the RHC on 7 September 1994, and the defendant replied vide his affidavit on 28 February 1995. Summary judgment was entered against the defendant on 29 June 1995. The defendant appealed, arguing that: (i) there was inordinate delay on the part of the plaintiffs, as they had only filed the O 14 application two months after the delivery of the defence, and that they had not given any explanation for the delay; and (ii) the notice of demand was not served on him. On the other hand, the plaintiffs contended that the delay had been explained, because the plaintiffs had to file the application for the change of name, and that since the order for substituting their name was obtained on 5 September 1994, and summary judgment was filed on 7 September 1994, the delay was only two days. To rebut the defendant's allegation that he did not receive the notice of demand, the plaintiffs referred the court to the writ and the notice of demand which was allegedly sent by the plaintiffs' solicitors to the defendant and their solicitors' postage record.

Held, allowing the defendant's appeal:

(1) An application for summary judgment under O 14 of the RHC must be made after an appearance had been entered. Where it is made after the delivery of the defence, the plaintiff must explain the delay. In the instant case, there was no explanation given in the affidavit in support of the O 14 application as to why the application was filed two months after the defence was filed. The only explanation was that given orally by counsel from the Bar, but it could not be accepted because to do so would be akin to shutting out the opponent from a right to challenge such statements. Thus, the plaintiffs had failed to give sufficient, cogent explanation for the delay in filing the O 14 application (see pp 450A–B and 451F); *Krishnamurthy & Anor v Malayan Finance Cop Bhd* [1986] 2 MLJ 134 and *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 followed; *Hsu Seng v Chai Soi Fua* [1980] 1 MLJ 300 not followed.

(2) On the unexplained delay alone, the court had power to set aside the order for final judgment (see p 451G–H); *Public Bank Bhd v Malamaju Enterprise Sdn Bhd & Anor* [1989] 2 MLJ 112 followed.

(3) Both the loan agreement and the guarantee in this case did not state the address of the defendant, and no evidence had been led as to whether the address as stated on the notice was the proper address to which the notice ought to have been sent. Thus, the defendant had further raised a triable issue with regard to the service of the notice of summons. Accordingly, this case should go for trial (see pp 452D and 453H).

[Bahasa Malaysia summary

Pihak plaintif telah memberi pinjaman kepada sebuah syarikat sejumlah RM1 juta di bawah suatu perjanjian pinjaman. Defendan adalah penggerentinya. Selain daripada mewujudkan satu debentur, defendan juga telah menggadaikan sebidang tanah miliknya kepada plaintif. Peminjam telah gagal membayar semula pinjaman tersebut, dan plaintif menjual tanah itu. Plaintif juga memulakan suatu tindakan secara writ terhadap defendan untuk mendapat semula jumlah baki pinjaman dan faedah yang terakru pada 30 April 1994. Defendan memasukkan kehadiran pada 28 Mei 1994, dan pembelaan pada 8 Julai 1994. Pada 21 Julai 1994, plaintif membuat suatu permohonan untuk menukarkan nama mereka daripada Standard Chartered Bank kepada Standard Chartered Bank Malaysia, menurut A 15 k 7 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Permohonan dibenarkan pada 5 September 1994. Plaintif memfailkan permohonan untuk penghakiman terus pada 7 September 1994, dan defendan membalas melalui afidavitnya pada 28 Februari 1995. Penghakiman terus telah dimasukkan terhadap defendan pada 29 Jun 1995. Defendan merayu, dengan menghujahkan bahawa: (i) terdapat kelewatan keterlaluan pada pihak plaintif, kerana mereka hanya memfailkan permohonan A 14 tersebut dua bulan selepas penyampaian pembelaan, dan bahawa mereka belum memberikan apa-apa penjelasan terhadap kelewatan

itu; (ii) bahawa notis tuntutan tidak disampaikan kepadanya. Plaintif pula mengatakan bahawa kelewatan telahpun dijelaskan, kerana plainitf perlu memfailkan permohonan untuk pertukaran nama, dan bahawa oleh kerana perintah untuk menukar nama diperolehi pada 5 September 1994, dan penghakiman terus telah difailkan pada 7 September 1994, maka kelewatan itu hanyalah dua hari. Untuk mematahkan pengataan defendan bahawa dia tidak menerima notis tuntutan, plaintif merujukkan mahkamah kepada writ dan notis tuntutan yang dikatakan telah dihantar oleh peguam plainitf kepada defendan, dan rekod pengiriman peguam mereka.

Diputuskan, membenarkan rayuan defendan:

(1) Permohonan untuk penghakiman terus menurut A 14 KMT hendaklah dibuat setelah kehadiran dimasukkan. Jika permohonan itu dibuat selepas penyampaian pembelaan, plaintif hendaklah memberi penjelasan tentang kelewatannya. Dalam kes ini, penjelasan tidak diberi dalam afidavit sokongan permohonan A 14 tersebut tentang mengapa permohonan difailkan selepas dua bulan pembelaan difailkan. Penjelasan tunggal hanya diberikan secara lisan oleh peguambela di mahkamah, namun, ia tidak boleh diterima kerana penerimaannya samalah seperti menidakkan hak pihak lawan untuk mencabar kenyataan sedemikian. Oleh itu, plaintif telah gagal memberikan penjelasan yang memadai dan yang meyakinkan tentang kelewatan dalam memfailkan permohonan di bawah A 14 tersebut (lihat ms 450A–B dan 451F); *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134 dan *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 diikut; *Hsu Seng Bhd & Anor* [1989] 1 MLJ 300 tidak diikut.

(2) Berasaskan kelewatan yang tidak dijelaskan itu sahaja, mahkamah mempunyai kuasa untuk mengenepikan penghakiman muktamad (lihat ms 451G–H); *Public Bank Bhd v Malamaju Enterprise Sdn Bhd & Anor* [1989] 2 MLJ 112 diikuti.

(3) Kedua-dua perjanjian pinjaman dan gerenti dalam kes ini tidak menyatakan alamat defendan, dan tidak terdapat keterangan yang menunjukkan sama ada alamat yang dinyatakan pada notis itu adalah alamat yang betul yang notis tersebut harus dihantarkan. Maka, defendan telah selanjutnya menimbulkan isu yang boleh dibicarakan berkenaan dengan penyampaian notis saman itu. Ekoran itu, kes ini harus dibicarakan (lihat ms 452D dan 453H).]

Notes

For cases on summary judgments, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3197–3520.

Cases referred to

Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors [1994] 2 MLJ 180

Amanah Merchant Bank Bhd v Lim Tow Choon [1994] 1 MLJ 413

Borneo Housing Mortgage Finance Bhd v Ngu Kil Cho & Anor [1991] 3 CLJ 2848
Hsu Seng v Chai Soi Fua [1990] 1 MLJ 300
Krishnamurthy & Anor v Malayan Finance Corp Bhd [1986] 2 MLJ 134
Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281
Public Bank Bhd v Malamaju Enterprise Sdn Bhd & Anor [1989] 2 MLJ 112

Legislation referred to

Evidence Act 1950 s 114(e)
Rules of the High Court 1980 O 14, O 15 r 7

KL Wong (*Nik Hussain & Partners*) for the plaintiffs.
Sekar Palaniandy (*Sault & Co*) for the defendant.

Cur Adv Vult

Kamalanathan Ratnam JC: This is an appeal by the defendant against an order of the senior assistant registrar giving judgment to the plaintiffs on an O 14 application on 29 June 1995.

The plaintiffs granted a loan to one Springdale Industries Sdn Bhd for a sum of RM1m with interest pursuant to a loan agreement. The defendant herein was a guarantor on the usual terms. In addition to creating a debenture, the defendant also charged a piece of his land to the plaintiffs. Since the borrower had failed to pay the loan, the plaintiffs sought recovery through the O 14 application against the defendant for the balance sum after disposing of the land referred to earlier to set off the loan and accrued interest. The writ and statement of claim was dated 30 April 1994 and filed on the same day. Appearance was entered for the defendant on 28 May 1994 and the defence filed on 8 July 1994.

An application was made by the plaintiffs on 21 July 1994 to change their name from Standard Chartered Bank to Standard Chartered Bank Malaysia Bhd pursuant to O 15 r 7 of the Rules of the High Court 1980. The need for the change of name was because, on 28 April 1994, the High Court in Kuala Lumpur had vide Originating Summons No D3–24–88–94 ordered that all assets, liability and property in the name of Standard Chartered Bank be transferred to Standard Chartered Bank Malaysia Bhd as of 1 July 1994. Upon obtaining the said order the plaintiffs herein filed the O 14 application for summary judgment on 7 September 1994 and an affidavit in support dated 7 September 1994 ('encl 7'). This defendant replied vide his affidavit dated 28 February 1995 ('encl 13').

Before me, Mr Sekar, for the defendant, confined his appeal to two issues. He argued that there was inordinate delay in filing the O 14 application. There was a delay of two months and he relied on *Abdul Manaf Mohd bin Ghows & Ors v Nusantara Timur Sdn Bhd & Ors* [1994] 2 MLJ 180. In that case, Anuar J (as he then was) relied on *Krishnamurthy & Anor v Malayan Finance Corp Bhd* [1986] 2 MLJ 134 wherein the then Supreme Court held at p 135:

> In the second place the law as to the time when an application for an O 14 judgment could be made is settled law. The application must be made after an appearance has been entered and it could be made either before or after the delivery of defence provided that where it was made after the delivery of the defence, the plaintiff must explain the delay. If this explanation was not accepted by the court no O 14 judgment could be signed.

Anuar J said in *Abdul Manaf* (at p 184):

> Now with hindsight and on re-reading carefully the affidavits filed on behalf of the plaintiffs in support of their application for summary judgment under O 14 of the Rules of the High Court 1980, I have not been able to find any explanation for the delay of some two months in making the application. As the appearance was entered on 28 March 1990, the application should have been made shortly after that. Since the plaintiffs did not explain in their affidavits the delay in making their application after the delivery of defence, I am, guided by *Krishnamurthy*'s case, constrained to hold that summary judgment should not be entered.

Mr Wong, for the plaintiffs, replied regarding to the delay by agreeing with the proposition of law enunciated in *Krishnamurthy*. He argued that the need for an explanation would arise if the application for summary judgment was filed after the delivery of the defence.

In this case, he says, the delay has been explained because the plaintiffs had to file an application to substitute its name from Standard Chartered Bank to Standard Chartered Bank Malaysia Bhd. The plaintiffs contended that they obtained this order for substitution on 5 September 1994 and soon thereafter, ie on 7 September 1994 they filed for summary judgment. There was therefore, they argued, a delay of two days only.

In any event, it was the contention of the plaintiffs that even if there was a delay, the court ought to consider if there are merits in the defence.

With regard to the question of delay, I find that since the statement of claim was filed on 30 April 1994 and appearance entered on 28 May 1994, the plaintiff ought to have filed their O 14 application soon after their appearance has been entered (following *Krishnamurthy*).

However, looking at encl 8 which is the affidavit in support of the O 14 application I see no explanation given as to why this application was filed two months after the defence was filed on 8 July 1994. Whatever explanation that has been proffered by the plaintiffs is an explanation from the Bar by Mr Wong.

In *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281 at p 287 Gopal Sri Ram JCA has this to say on a similar situation:

> I have carefully perused the affidavit filed by the respondent in support of its summons for judgment (which is the only affidavit delivered by it) but have been unable to discover any such explanation as that alluded to by the learned judicial commissioner. The only reference to the delay point is to be found in the address of counsel for the respondent in the court below and the explanation is in reality that of counsel and not of his client under oath. It is a principle fundamental to our system of adversarial litigation that evidence upon a matter must be given on oath. The practice of counsel giving evidence from the Bar, as was done in this case, is to be deprecated. To act as the learned judicial commissioner did in this case, is to ignore the

A very basic tenets of the law of evidence that is applied by our courts. Here was a positive assertion on oath by the appellants that there had been inordinate delay. The proper way in which that was to be met was by way of an affidavit in answer, explaining the delay. Once this is done, then it is up to the judicial arbiter to accept or reject the explanation proffered. But to ride roughshod over such an important point, as was done here, does B little to advance the course of justice according to the law.

His Lordship went further and relied on the judgment of another eminent judge. He continued at p 289:

> It follows from what Abdoolcader J has said [in *Societe des Etains de Bayas Tudjuh v Woh Heng Mining Kongsi* [1978] 2 MLJ 267] that whenever there C is a delay, it is for the plaintiff in the first place to give an explanation for it in the usual way, that is, by affidavit, even before the point is taken by the other side.

Since whatever explanation for the delay was given by counsel orally and reliance was placed on an affidavit in support of another application to D substitute the name of the plaintiffs, I hold that the plaintiffs have failed to give sufficient, cogent explanation for the delay. I was referred by counsel for the plaintiffs to *Hsu Seng v Chai Soi Fua* [1990] 1 MLJ 300 where Haidar J expressed the view that as the facts pertaining to the delay were within the personal knowledge of counsel, the oral explanation for the same could be accepted by the court although ideally such explanation E should be by affidavit to enable the other party if he wishes, to challenge the facts relied on.

I am bound by the principle of stare decisis to adopt and uphold the decision of Gopal Sri Ram JCA in *Ng Hee Thoong*. Speaking for myself, I would totally accept the views of the appellate judge because allowing F counsel to explain controversial matters from the Bar is akin to shutting out the opponent from a right to challenge such statements and condonation of such a stand by the court would be tantamount to lifting the lid off the proverbial pandora's box.

As to whether the question of delay alone could be sufficient to G warrant setting aside the judgment and to give leave, I am guided by the decision of Abdul Malek J in *Public Bank Bhd v Malamaju Enterprise Sdn Bhd & Anor* [1989] 2 MLJ 112 at p 114 wherein his Lordship said:

> Concerning the appeal by the fourth and sixth defendants, the plaintiffs had applied for final judgment against the second, fourth and sixth defendants H by way of summons-in-chambers filed on 6 November 1987. The fourth and sixth defendants had in fact filed their joint statement of defence on 28 July 1986 and there had been no explanation from the plaintiffs as to the 16-month delay in filing their application except for para 11 in encl 33 where the plaintiffs averred on the time taken for foreclosure proceedings. On the unexplained delay alone, the court had the power to set aside the order for I final judgment if it thought it fit.

The next issue taken by the defendant is that the notice of demand was not served on him. I was referred to the writ of summons and to the notice of demand that was allegedly sent by the plaintiffs' solicitors, Messrs Nik Hussain & Partners, dated 5 April 1994 to the defendant and which was specifically denied in the defence. In support of the O 14 application, this notice of demand was exhibited and it showed two addresses:

(a) c/o 3461, Hilir Garden
Ujong Pasir
75050 Melaka

(b) c/o Jeuro Development Sdn Bhd
588 1st Floor
Taman Melaka Raya
75000 Melaka

The plaintiffs have also shown that these two letters were sent to the above addresses by exhibiting their solicitors' postage record. However, the loan agreement that has been exhibited and which shows details of the guarantor significantly makes no reference to any address of the defendant. In fact, other than merely stating his name and identity card number, the guarantee signed by both parties and stamped, gives no address of the defendant.

However, the fixed loan agreement which has been exhibited gives the addresses of both the lender and the borrower. Mr Sekar then argued that a notice of demand was not served on the defendant.

In reply to this point, Mr Wong contended that the defence is a mere denial, and that the defendant ought to have descended to particulars. He argued that the defendant ought to assert that he was no longer residing at that address and that failure to assert raised the presumption under s 114(e) of the Evidence Act 1950. That section reads:

> The court may presume —
> ...
> (e) that judicial and official acts have been regularly performed;

This presumption was raised by Syed Ahmad Idid JC (as his Lordship then was) in *Borneo Housing Mortgage Finance Bhd v Ngu Kil Cho & Anor* [1991] 3 CLJ 2848 which case was relied upon by the plaintiffs. With respect, a case more on point would be *Amanah Merchant Bank Bhd v Lim Tow Choon* [1994] 1 MLJ 413 wherein Mohamed Dzaiddin SCJ said (at p 419):

> In the light of the meaning of the word 'post' stated above, it follows that a notice which is sent by post, whether registered or not, is still 'posted' in the ordinary sense of the word, and in the instant case, the fact that the notice of demand was sent by AR registered post would not make any difference since registration is merely one way of sending a letter. It must, however, be borne in mind that the mode of service of a notice of demand in a given case will depend on the words of the relevant clause in the guarantee, as it is quite common for the guarantee to expressly provide the manner in which a notice is to be given to the guarantor. See *Cooperative Central Bank Ltd* (unreported) and *MBf Finance Bhd* [1990] 1 MLJ 180 where, in both cases, the notice of demand was required to be sent by registered post. Or there may be instances where a clause in a guarantee may provide the mode of service by prepaid AR registered post. Be that as it may, the practical effect of sending a letter by registered post is quite apparent. It provides evidence of the posting and in the case of AR registered post, to borrow VC George J's words, 'it is just a sophisticated version of the ordinary registered post'.

Therefore, on the proper construction of cl 17, since any notice may be served by sending the same through the post addressed to the last known address of the addressee, in our view, the deeming provision applies to the said notice, whether or not it is sent by AR registered post. Clause 17 does not provide that the notice should either be sent by registered post or AR registered post, and the fact that these words were omitted from cl 17 cannot justify the court reading those words in cl 17 as was done by the learned judge. In the context of cl 17 of the said guarantee, we are further of the view that it is not necessary that the appellant must show that the AR card has been returned duly acknowledged to constitute effective service of the notice of demand. It is sufficient for the appellant to show that the notice was correctly addressed, prepaid and delivered to the post office and acknowledged for service by the postal authority. Once these facts have been established, the deeming provision will inevitably apply.

Many authorities were cited to me by learned counsel for the plaintiffs suggesting that the defendant ought to condescend to particulars.

I invited both parties to refer to the address endorsed on the writ which stated the defendant's address as:

No 3461, Hilir Garden
Ujong Pasir
75050 Melaka

and sought submissions from both parties if this would be sufficient to suggest that the defendant was served at the correct address, since this address was one of the addresses stated in the demand notice.

The defendant contended that the summons was not served at this address. A perusal of the court file shows that no affidavit of service has been filed, and that appearance was entered on 28 May 1994 by the present solicitors for the defendant.

I hold that the decision in *Amanah Merchant Bank* would have bound me had the plaintiffs been able to show in their fixed loan agreement or anywhere in their affidavit the correct address of the defendant.

No evidence has been led as to whether this address:

No 3461, Hilir Garden
Ujong Pasir
75050 Melaka

was the proper address to which the notice of demand ought to have been sent. In the circumstances, I further hold that the defendant had further raised a triable issue with regard to the service of the notice of summons.

I am of the opinion that I need not look at the merits of the case. Suffice it to say that on the issue of delay and notice of demand, the defendant has satisfied me that this case ought to go for trial.

The judgment of the senior assistant registrar dated 29 June 1995 is hereby set aside with costs and leave is hereby given for the defendant to defend this action. The court will fix an early date for the hearing of this case.

Appeal allowed.

Reported by Angela Ho